

INTERSTATE COMMERCE COMMISSION 02/09/96

FINANCE DOCKET # 32760

1153-1190 4.

1 change of time, assuming Mr. Grinstein has not made a  
2 morning commitment that I'm not aware of.

3 JUDGE NELSON: Can you reach him now?

4 MS. JONES: No, Your Honor. I cannot.  
5 He's travelling.

6 MR. LUBEL: Can we just have the  
7 understanding that if he can't make it until 10:00  
8 that if necessary, we can go until 6:00?

9 MS. JONES: We'll go until 6:00. I  
10 believe that is a reasonable accommodation.

11 JUDGE NELSON: All right, so the hearing -  
12 - the deposition will either be from 9:00 to 5:00 of  
13 from 10:00 to 6:00.

14 MS. JONES: Yes, Your Honor.

15 JUDGE NELSON: And counsel will work that  
16 out.

17 MS. JONES: And I assume Mr. Lubel is  
18 arranging the court reporter?

19 MR. LUBEL: Oh yes.

20 JUDGE NELSON: You may apply the FERC  
21 procedures here, which is lunch and one rest break in  
22 the morning and one in the afternoon. And our typical  
23 break would be ten to 15 minutes.

24 MS. JONES: And I would -- I don't know if  
25 that was serious or in jest, but Mr. Lubel subjected

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1 video taping.

2 I do object to that. I have not raised  
3 that with Mr. Grinstein, and I don't believe that's  
4 necessary.

5 JUDGE NELSON: Have we been doing that  
6 throughout?

7 MS. JONES: No, Your Honor.

8 MR. LUBEL: No, we haven't.

9 JUDGE NELSON: I see no need for that  
10 then. Let's just make it a conventional deposition.  
11 There will be a reporter there, and that's the story.

12 Now we -- this is not your witness. Do  
13 you want to question him?

14 MR. ROACH: Actually, I do. I do. I  
15 actually have some standing here.

16 JUDGE NELSON: Then you may be there.

17 MR. ROACH: Yes. I just want -- so that  
18 Mr. Lubel and company are not surprised, our interests  
19 in BN and Santa Fe are not perfectly congruent,  
20 although we are both supporting the settlement.

21 And it may well be that I will have some  
22 brief questions I will want to ask. So when you're  
23 working out your schedule, don't forget to give me  
24 half an hour or --

25 JUDGE NELSON: Now if you're in Fort Worth

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1 and someone else is here with Anschutz, who is going  
2 to be representing the Applicants before me and any  
3 rulings that I may have to make?

4 MR. ROACH: I will be at the Anschutz  
5 deposition, as I believe will Mr. Cunningham. Another  
6 of my partners will be at the Grinstein deposition.

7 JUDGE NELSON: So who would be -- say we  
8 have to come over here. I have to go someplace, and  
9 I want counsel. Who would --

10 MR. ROACH: Paul will be --

11 JUDGE NELSON: Mr. Cunningham will be  
12 around?

13 MR. ROACH: Paul would come and --

14 JUDGE NELSON: That's fine. All right.

15 MR. LUBEL: And Your Honor, just so we can  
16 be clear, there is no ruling in advance on the scope  
17 of the deposition? If anybody feels it's getting out  
18 of hand, they could call you by phone?

19 JUDGE NELSON: We can discuss the scope if  
20 Ms. Jones wants to or you want to, or we can let it  
21 go. And it's awfully hard to rule on that on the  
22 phone to Fort Worth, Texas, but --

23 MR. LUBEL: On that, I would just remind  
24 the Court, and I went through these points before in  
25 one of our earlier discovery conferences, about all

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1 the various statements in Commission orders both by in  
2 the Burlington Northern case and in this case where  
3 they said that they would consider the cross-over  
4 effects and cumulative effects of one merger on the  
5 other.

6 Anybody has any current concerns about the  
7 competitive impact that will effectively guard against  
8 harm to competition and, if necessary, take the  
9 appropriate steps to preserve competition, then the  
10 decision we will ultimately reach in the UPSP  
11 proceeding.

12 And we can --

13 JUDGE NELSON: How do you feel, Ms. Jones,  
14 if we don't thrash out anything in terms of scope, but  
15 just say you'll begin at 9:00 and you go to 5:00, or  
16 10:00 to 6:00? And at that time, the deposition ends.

17 MS. JONES: Well, I'm willing to accept  
18 the time limitation as --

19 JUDGE NELSON: And you, of course, may  
20 instruct the witness to answer when you think that  
21 instruction is appropriate.

22 MS. JONES: That's correct, Your Honor,  
23 and I expect I'll do that if it appears that we're  
24 getting out of hand into irrelevant or into topics  
25 that are irrelevant or otherwise appropriate for such

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1 instruction.

2 JUDGE NELSON: This was the Chief  
3 Executive Officer of the --

4 MR. LUBEL: Burlington Northern.

5 JUDGE NELSON: -- Burlington Northern at  
6 the time of the agreement?

7 MR. LUBEL: Of their merger and with the  
8 agreement in this case.

9 JUDGE NELSON: Their merger is -- may be  
10 another story. I don't know that I --

11 MR. LUBEL: Well Your Honor, that's what  
12 I was addressing here. The Commission in their case  
13 that it will address in the UP case any cross-over or  
14 cumulative effects on competition --

15 JUDGE NELSON: Okay, I remember you  
16 telling me that before.

17 MS. JONES: But Your Honor, we are  
18 offering three witnesses starting next week who have  
19 testified in this case.

20 And they can question all they want about  
21 -- within the appropriate scope of your rulings in  
22 this case. We have three witnesses we're making  
23 available.

24 JUDGE NELSON: What's wrong with simply  
25 letting it go on and Mr. Grinstein is prepared to lose

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1 this day anyway -- whatever happens, happens.

2 MR. LUBEL: That's fine with us.

3 JUDGE NELSON: And if -- if these lawyers  
4 want to take their time to talk about events of --  
5 when was your merger, a couple of years ago?

6 MR. LUBEL: Ninety-four, '95.

7 MS. JONES: No, it was last year.

8 JUDGE NELSON: It started in --

9 MR. LUBEL: It started in October of '94.

10 JUDGE NELSON: If they want to spend all  
11 the time on those details and not get into case at  
12 bar, that's a choice they make.

13 MS. JONES: That's fine, Your Honor.

14 JUDGE NELSON: If they want to spend a lot  
15 of time with our case and our claim benefits and  
16 disagreement and its workings and its by-play, then  
17 that's also their choice.

18 They have to choose what they think the  
19 Board wants to hear and what they think they can make  
20 their own case out of.

21 Then if you run into serious problems, you  
22 can reach me on the phone. I'll be here

23 MS. JONES: That's fine, Your Honor.

24 JUDGE NELSON: I'll try to take not the  
25 traditional FERC hearing lunch break, but a shorter

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1 one so that I'll be around.

2 In fact, you might let me know, is -- Fort  
3 Worth's time is different, isn't it?

4 MS. JONES: It's one hour later.

5 JUDGE NELSON: Why don't you let me know  
6 so that I'll arrange to be in the office during the  
7 entire Grinstein deposition if needed -- so I can be  
8 there if you want me.

9 MS. JONES: All right. We will call you.

10 JUDGE NELSON: But you've got to tell me  
11 about it. Otherwise, I'll forget.

12 MS. JONES: We will call you that morning,  
13 Your Honor.

14 JUDGE NELSON: Anything else? With regard  
15 to the local deposition, if needed, I might come over  
16 there, particularly if looking at documents sometimes  
17 helps, looking at people, figuring things out.

18 But Fort Worth I'll have to work on the  
19 phone if necessary.

20 MS. JONES: You're welcome to Fort Worth,  
21 Your Honor.

22 JUDGE NELSON: I've been there, but I  
23 don't know that the Board has money to spend on the  
24 presiding of depositions in Fort Worth. So I wouldn't  
25 want to incur those expenses.

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1 But I might come over to Covington's  
2 offices should that be necessary, if there's problems  
3 with Anschutz.

4 Anything else we need to deal with today?  
5 You have some -- still have other matters.

6 MR. LUBEL: I do and --

7 JUDGE NELSON: We've got 20 minutes.

8 MR. LUBEL: Can I do one?

9 JUDGE NELSON: Sure.

10 MR. LUBEL: Okay, the issue I would like  
11 to take up, it relates to more witnesses also, Your  
12 Honor. This has to do with some witnesses of Southern  
13 Pacific.

14 It comes out of some documents. I've got  
15 copies for everybody. This -- this is a set of  
16 documents that were -- came in discovery and forms the  
17 basis of our request for additional depositions.

18 I have underlined in everybody's copy the  
19 persons I'm going to refer to.

20 JUDGE NELSON: This is the additional SP  
21 employees?

22 MR. LUBEL: Yes. Your Honor, we're this  
23 applies to a lot of the issues you've got, but I think  
24 we're at a new stage in these discovery matters.

25 I call it a more mature or second stage,

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1 because we're now coming to you asking for additional  
2 discovery based on things that we have found.

3 And this is a case in point. I call this  
4 the -- this is either the incentives to -- or the  
5 attempt to exclude BN/SF.

6 There are two issues presented by these  
7 memos. First, what these are, these are internal  
8 Southern Pacific memos dealing with -- the page I've  
9 turned you to --

10 JUDGE NELSON: I have a page marked HC-62-  
11 000003.

12 MR. LUBEL: That's it, Your Honor. And  
13 it's right in the middle of the page.

14 JUDGE NELSON: Mr. Cunningham, do you see  
15 what I'm looking at here?

16 MR. CUNNINGHAM: Yes.

17 JUDGE NELSON: Is this a secret --

18 MR. LUBEL: Well, this is a highly  
19 confidential document.

20 JUDGE NELSON: Does that mean I can't talk  
21 about it?

22 MR. LUBEL: Well no, I think --

23 MR. CUNNINGHAM: The transcripts are --

24 MR. LUBEL: The transcript has to be  
25 marked as highly confidential.

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1 MR. ROACH: That's correct. This point  
2 from here --

3 JUDGE NELSON: I ought to hire a  
4 consultant.

5 MR. LUBEL: Your Honor, what this is is  
6 one of their internal marketing documents which says -  
7 -

8 JUDGE NELSON: All right, so we're now  
9 going to go into closed session, and I'll leave it to  
10 you to -- whose data is this?

11 \*\*\* BEGINNING OF CLOSED SESSION

12 MR. ROACH: This page is Southern Pacific.

13 JUDGE NELSON: So I'll leave it to Mr.  
14 Cunningham to police the room.

15 MR. LUBEL: And what this -- this is  
16 talking about a company --

17 JUDGE NELSON: "View the note," it says.

18 MR. LUBEL: What?

19 JUDGE NELSON: "View the note."

20 MR. LUBEL: That's -- if you're going to  
21 start from the top, one of our issues is, Your Honor,  
22 is exactly what type of communication this is.

23 Basically, it's some type of internal  
24 communication between their Marketing Department  
25 concerning the company -- the customer Quantum and

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1 extension of the contract.

2 And if you'll see about halfway down where  
3 I've underlined, they're talking about a contract  
4 extension. And they say "This approval is predicated  
5 upon customer support of UP/SP merger."

6 JUDGE NELSON: Aha.

7 MR. LUBEL: One of the things we said is  
8 promulgated --

9 JUDGE NELSON: You were looking for  
10 evidence of inducements to --

11 MR. LUBEL: Right.

12 JUDGE NELSON: -- whip up support, right.

13 MR. LUBEL: And it -- but there's not only  
14 that, Your Honor. If you'll go -- I think I marked  
15 the page.

16 If you'll go to the page below that, which  
17 is page number six in that series -- you were on three  
18 -- you go three pages down, then there's  
19 "recommendations."

20 JUDGE NELSON: You've outlined them in  
21 yellow?

22 MR. LUBEL: Yes, I have done the same on  
23 each counsel's copy, so --

24 JUDGE NELSON: Let me read mine.

25 MR. LUBEL: -- everybody has got the

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1 highlighted version because there's a second --

2 JUDGE NELSON: It also begins with some  
3 notion like that.

4 MR. LUBEL: Yes.

5 JUDGE NELSON: All right, so what? Now  
6 you've found this.

7 MR. LUBEL: The second -- I want to  
8 identify the second issue for Your Honor. It's not  
9 only that they're trying to get support through  
10 offering contract extensions, but that portion also  
11 says that if you -- I didn't underline this, but it  
12 says, "We should approve the extension as protection  
13 from BN/ATSF competition should forced conceptions  
14 result in their competitive access."

15 What that issues shows, Your Honor, is  
16 that while they're talking to the Commission and the  
17 public about "Oh, we're opening up competition. We're  
18 opening up competition," internally the people that  
19 are down in the trenches doing the work are trying to  
20 lock up business so that Burlington Northern can't get  
21 it.

22 So it really would be, you know -- there  
23 won't be anything for Burlington Northern to compete  
24 for, and it will make these trackage rights and this  
25 supposed concession meaningless.

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1 Now, this is one -- well, it's really a  
2 couple of memos. They start in September and run  
3 through November --

4 JUDGE NELSON: All right, I understand  
5 this.

6 MR. LUBEL: -- with one client.

7 JUDGE NELSON: So where is it you want to  
8 go with this?

9 MR. LUBEL: What I want to do is there's  
10 at least three people I want to depose. There's a Sam  
11 Meade.

12 On the last page, Your Honor, there  
13 appears to be the beginning of all of this. It  
14 started in September. And he is Director, National  
15 Accounts.

16 And this was talking about --

17 JUDGE NELSON: He's an SP man?

18 MR. LUBEL: Yes.

19 JUDGE NELSON: He works in Cincinnati?

20 MR. LUBEL: Right. And this -- this went  
21 to Mr. Jara, Gil Jara, and to Mr. Jim Gehring, and  
22 it's Sam Meade.

23 And he kind of cites the same two issues  
24 we've already read in the other portions.

25 JUDGE NELSON: All right. Now what's the

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1 objection to these papers?

2 MR. LUBEL: And what I'd like to do is I  
3 want to depose Mr. Meade, Mr. Gehring and Mr Jara  
4 about not only this instance, but other instances in  
5 which they did this.

6 JUDGE NELSON: Which is Mr. Gehring?  
7 Where do you see his name?

8 MR. LUBEL: At the top of the last page.  
9 It's was -- the "TO" is to Gil Jara, J-A-R-A.

10 JUDGE NELSON: What page is this?

11 MR. LUBEL: If you go to the last page and  
12 their names appear on all these pages really.

13 JUDGE NELSON: 3923?

14 MR. LUBEL: Yes, 3923.

15 JUDGE NELSON: Jara, is that who --

16 MR. LUBEL: You see it's from Sam Meade,  
17 or Sam Meade is at the bottom.

18 JUDGE NELSON: Yes.

19 MR. LUBEL: I don't know if it's from him.  
20 But it's to Gil Jara --

21 JUDGE NELSON: I see that.

22 MR. LUBEL: -- and Jim Gehring, G-E-H-R-I-  
23 N-G has apparently got a copy. Their names appear on  
24 the other versions in later memos on this same  
25 subject.

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1 I want to depose him to ask about this  
2 situation, to establish that it is what it appears to  
3 be, about other similar situations they were involved  
4 in and the extent to which this was a policy of the  
5 Southern Pacific.

6 I think that the obviousness of it, the  
7 relevance of it, is self-evident, Your Honor.

8 MR. ROACH: Your Honor, let me just give  
9 you word of background and then ask Mr. Cunningham to  
10 address the deposition of these specific individuals.

11 By way of background, if you will recall,  
12 we had an extensive debate about how much discovery  
13 there should be into this issue of so-called "shipper  
14 threats" or inducements or deals.

15 Your Honor instructed us --

16 JUDGE NELSON: I remember the debate. I  
17 don't remember exactly how it came out. We drew some  
18 lines.

19 MR. ROACH: We drew some lines and we  
20 struck a compromise as to how widely we would search.  
21 In the event, what we actually did was to go to say  
22 forget the compromise. We'll do a comprehensive  
23 search and we will produce every single one.

24 And we found five shippers where there  
25 were agreements that related in some way to the

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1 merger.

2 JUDGE NELSON: And this is one of them?

3 MR. ROACH: And this is one of them. And  
4 I just want you to understand that we've got 1,200  
5 supporting shippers. We've got five of them where  
6 there are these transactions.

7 Second, we want --

8 JUDGE NELSON: Are these names involved in  
9 each of the five --

10 MR. ROACH: No, no.

11 JUDGE NELSON: -- these same people?

12 MR. ROACH: No. I think there are two of  
13 these involving Southern Pacific and four involving  
14 Union Pacific, one shipper common to the two.

15 So there is a total of five shippers, six  
16 incidents if you like.

17 JUDGE NELSON: Six potential witnesses?

18 MR. ROACH: Or more. I mean, Mr. Lubel  
19 probably wants to identify 100 witnesses because he's  
20 picked every name he can find on this piece of paper.

21 But the other point I want to make before  
22 I turn to Mr. Cunningham is simply that we did a  
23 thorough investigation and we provided an extensive  
24 narrative response as to what the policy of the  
25 Applicants was.

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1 We have produced a document showing what  
2 the instructions were to shippers, solicitors, that  
3 they were not to make any offers; they were not to  
4 make any promises; they were not to make any threats.

5 We explained how these transactions came  
6 to occur, that they related to commercial benefits of  
7 the merger. They related to the desire of the shipper  
8 to have a contract that addressed this issue, and were  
9 very reluctantly entered into by the Applicants.

10 We don't contest the right of discovery  
11 into this. And Mr. Cunningham will explain why there  
12 is a witness who can address these issues, and there's  
13 a UP witness who can address these issues.

14 The only real question -- I want you to  
15 understand the background because that's important to  
16 us.

17 But the real issue is simply can they get  
18 the answers from --

19 JUDGE NELSON: Well, your letter to me  
20 says something to the effect that you'll produce  
21 additional witnesses when it seems that they're  
22 necessary.

23 MR. ROACH: Absolutely.

24 JUDGE NELSON: What do you mean to do  
25 there?

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1 MR. ROACH: Well, what I want to do --

2 MR. CUNNINGHAM: Your Honor, if I could  
3 step back before I answer your question for a moment,  
4 it was the policy, which was explained in the answer  
5 that Mr. Roach referred to, was explained in all  
6 internal documents, and as Mr. Gray, the marketing  
7 witness for SP will explain is a policy of the SP that  
8 incentives not be provided.

9 And the question will the -- that's  
10 relevant here is whether these were transactions that  
11 were wise unto themselves, or whether some people in  
12 the field thought they could get some extra kudos at  
13 home by writing in and saying they were going to  
14 support the merger also, or whether something was done  
15 truly in exchange for support, which is contrary to  
16 SP's explicit policy.

17 That's a question that I think Mr. Lubel  
18 will be able to get an answer to by talking to the  
19 chief marketing witness for SP in the proceeding, Mr.  
20 Gray.

21 JUDGE NELSON: Gray?

22 MR. CUNNINGHAM: Yes.

23 MR. ROACH: Who will be deposed in two  
24 weeks.

25 MR. CUNNINGHAM: Yes.

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1 JUDGE NELSON: He is not mentioned on any  
2 of these, is he?

3 MR. CUNNINGHAM: No, but he will have  
4 access to these documents.

5 MR. ROACH: He's on page two.

6 MR. CUNNINGHAM: And he's on --

7 MR. LUBEL: That's a different customer  
8 base.

9 JUDGE NELSON: Do these people work for  
10 Gray?

11 MR. CUNNINGHAM: He supervised the entire  
12 shipper support activity, so he --

13 JUDGE NELSON: Well, how about Mr. Gehring  
14 and Mr. Jara --

15 MR. CUNNINGHAM: Mr. Gehring and Mr. Gray  
16 -- Mr Gray is the next level down working for Mr.  
17 Orris, who is the head of the Marketing Department.

18 JUDGE NELSON: Is Mr. -- take Mr. Gil  
19 Jara. Is he above or below Mr. Gray?

20 MR. CUNNINGHAM: He is quite a ways below.

21 JUDGE NELSON: How about Mr. Gehring?  
22 Where is he?

23 MR. CUNNINGHAM: Mr. Gehring is about two  
24 levels below.

25 JUDGE NELSON: Below Mr. Gray?

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1 MR. CUNNINGHAM: Yes.

2 JUDGE NELSON: And who is this other name  
3 here?

4 MR. CUNNINGHAM: Sam Meade.

5 JUDGE NELSON: Meade. Where is he?

6 MR. CUNNINGHAM: He is also a couple of  
7 levels below Mr. Gray.

8 JUDGE NELSON: Do these persons ultimately  
9 report to Mr. Gray?

10 MR. CUNNINGHAM: They report to Mr. Gray  
11 and Mr. Orris who is above Mr. Gray.

12 JUDGE NELSON: But is Gray in their chain  
13 of command?

14 MR. CUNNINGHAM: In this insofar as they  
15 were participating in the shipper -- it's a little  
16 complicated. But insofar as they were participating  
17 in the shipper support effort, yes.

18 JUDGE NELSON: So it's as though we want  
19 to have the Bird Colonel testify about some dealings  
20 that the NCOs were allegedly cutting between  
21 themselves to divvy up the --

22 MR. CUNNINGHAM: It's a loose analogy.

23 JUDGE NELSON: Yes.

24 MR. CUNNINGHAM: The point -- the question  
25 is whether --

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1 JUDGE NELSON: Suppose there really had  
2 been a deal.

3 MR. CUNNINGHAM: Let's assume there was,  
4 Your Honor.

5 JUDGE NELSON: Would the -- we call the  
6 NCOs in, the potential witnesses, would they have had  
7 the authority to make one?

8 MR. CUNNINGHAM: To make -- no, they --  
9 they have --

10 JUDGE NELSON: To do a quid pro quo?

11 MR. CUNNINGHAM: No, they did not have the  
12 authority to make that.

13 JUDGE NELSON: Would Gray have had that  
14 authority?

15 MR. CUNNINGHAM: No one had the authority  
16 to --

17 JUDGE NELSON: Because it was not your  
18 policy.

19 MR. CUNNINGHAM: -- was not the policy.

20 JUDGE NELSON: Suppose there had been a  
21 rump deal, a extra-legal, cut on the side, could these  
22 guys have done it, the names mentioned in these  
23 memoranda?

24 MR. CUNNINGHAM: There is no allegation of  
25 illegality here, Your Honor.

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1 JUDGE NELSON: I don't mean illegality in  
2 the sense of violating any written law. I mean in the  
3 sense of violating the company's policy.

4 MR. CUNNINGHAM: These guys could have  
5 violated the company policy, yes. And they can ask  
6 Mr. Gray whether he thinks they did or not.

7 JUDGE NELSON: How would he know?

8 MR. CUNNINGHAM: Well, he knows what's in  
9 these documents, which is the communicatio... And he  
10 knows the nature of the transaction that was entered  
11 into.

12 JUDGE NELSON: Say the policy of the  
13 company is we do not discriminate against women in the  
14 hiring process.

15 MR. CUNNINGHAM: Not at issue here, Your  
16 Honor.

17 JUDGE NELSON: And that is -- I'm using  
18 this as a hypothetical. And Mr. Gray is at the top of  
19 the heap for these purposes.

20 Several layers under him are two guys  
21 whose view is no woman is ever going to work in this  
22 office, because the next thing you know she'll be  
23 pregnant and we'll lose her for six months, or  
24 whatever it is, that old thinking.

25 And that flatly violates company policy.

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1 But they go ahead and they don't hire any women  
2 anyway. Mr. Gray, all he could testify to is that  
3 that's not company policy. If they did that, they  
4 ought to be fired --

5 MR. CUNNINGHAM: You know -

6 JUDGE NELSON: But that isn't going to  
7 prove whether there was discrimination.

8 MR. CUNNINGHAM: With all due respect,  
9 Your Honor, the analogy breaks down about halfway  
10 through.

11 JUDGE NELSON: Good, explain it.

12 MR. CUNNINGHAM: This case -- this case is  
13 about whether this -- back to the beginning -- of  
14 whether this transaction is consistent with the public  
15 interest.

16 JUDGE NELSON: Yes sir.

17 MR. CUNNINGHAM: Right? One of the  
18 questions is whether shippers support this  
19 transaction, okay? One of the questions behind that  
20 is whether the shippers support, that exist -- and I  
21 don't think there is any claim here that the shippers  
22 are not supporting this transaction -- were unfairly  
23 induced to support this.

24 JUDGE NELSON: It goes to the weight of  
25 their support.

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1 MR. CUNNINGHAM: It goes to the weight of  
2 their support.

3 JUDGE NELSON: Yes sir.

4 MR. CUNNINGHAM: All right? The nature of  
5 the agreement and the agreement itself and its  
6 economic consequences --

7 JUDGE NELSON: Which agreement are we  
8 talking about?

9 MR. CUNNINGHAM: The agreement in this  
10 case with Quantum, for example, will be fully within  
11 the capacity of Mr. Gray to attest to.

12 He will not be able to give the personal  
13 reflection of Mr. Meade or Mr. Gehring or anyone else  
14 who may have been involved in this particular  
15 conversation with the shipper.

16 Nor is that relevant to the question  
17 before the Board, which is the weight of the evidence.

18 No one is attesting that these documents  
19 do other than exist.

20 JUDGE NELSON: Is it your position that if  
21 there was a deal cut by Mr. Jara and Mr. Gehring and  
22 Mr. Meade, Gray would know about it?

23 MR. CUNNINGHAM: Gray will know -- does  
24 know about it. He knows what the nature of this  
25 arrangement was.

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1 JUDGE NELSON: So your view is we take  
2 Gray first --

3 MR. CUNNINGHAM: Yes.

4 JUDGE NELSON: -- and see what's left.

5 MR. CUNNINGHAM: Right.

6 JUDGE NELSON: What's wrong with that?  
7 What do you lose by doing that?

8 MR. LUBEL: Your Honor, we know what Mr.  
9 Gray is going to say. He's going to say what they  
10 said their policy was: "It is our policy that we do  
11 not do this."

12 JUDGE NELSON: Yes.

13 MR. LUBEL: But we now know, Your Honor --  
14 I've shown you the evidence. I have documents showing  
15 here --

16 JUDGE NELSON: So you ask Mr. Gray about  
17 the specifics --

18 MR. LUBEL: -- that on the field level,  
19 they do this.

20 JUDGE NELSON: -- and what's he going to  
21 say? It never happened, they didn't do it?

22 MR. LUBEL: Well, he'll say that was --  
23 he'll probably say a lot of things. He'll say it  
24 never happened. If it did happen, they weren't  
25 supposed to do it. If they did do it, they were

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1 insane, you know?

2 He's going to give the party line that  
3 you've already got in the record.

4 JUDGE NELSON: Okay. Then you come back  
5 and you say, "All I've got is the party line and I  
6 can't get any evidence as to whether it really  
7 happened."

8 MR. CUNNINGHAM: But he can ask the  
9 shipper.

10 MR. LUBEL: But Your Honor, I mean the  
11 point is, here we have shown you where these guys are  
12 --

13 JUDGE NELSON: The shipper is afraid under  
14 their theory --

15 MR. LUBEL: -- where these guys are doing  
16 this. They are out there conditioning a contract  
17 extension on support.

18 And they're also saying it's a good thing  
19 to do because it will keep the BN away --

20 MR. CUNNINGHAM: Now wait a minute.

21 JUDGE NELSON: Mr. Cunningham, what's  
22 wrong with allowing this -- these depositions?

23 MR. CUNNINGHAM: It's a waste of time,  
24 Your Honor.

25 JUDGE NELSON: Where are these people

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1 located?

2 MR. CUNNINGHAM: They're all over the  
3 place. Mr. Gehring is down in Texas someplace, I  
4 believe. Mr. Meade is where, in the midwest  
5 someplace, and I don't know where the third guy is.

6 JUDGE NELSON: Well, going to Texas is not  
7 unusual in this case.

8 MR. CUNNINGHAM: Your Honor, this has  
9 nothing to do with the merits of this case. Either  
10 there was a deal or there wasn't. Either Quantum was  
11 induced.

12 The only party who can tell you whether  
13 Quantum was induced by other than the value of the  
14 transaction is Quantum.

15 And with respect to the proposition that  
16 we're out there locking up the business, we seem to  
17 have a contradiction.

18 On the one hand, we're out there locking  
19 up the business that we're really afraid of losing,  
20 right? Boy, that's terrible. We're locking up the  
21 business. That's what we're there for.

22 We're locking up this business. But on  
23 the other hand, Quantum -- we wouldn't have given this  
24 deal to Quantum except for the fact that they were  
25 going to sign up for our program.

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1 Now there's a contradiction in theory that

2 --

3 JUDGE NELSON: When is the Gray  
4 deposition?

5 MR. CUNNINGHAM: Pardon?

6 JUDGE NELSON: When is --

7 MR. CUNNINGHAM: When is the Gray? Two  
8 weeks, end of February.

9 JUDGE NELSON: And where will it be?

10 MR. ROACH: Right here.

11 MR. CUNNINGHAM: Here.

12 JUDGE NELSON: Can we advance it up in  
13 time?

14 MR. CUNNINGHAM: I don't think so, Your  
15 Honor.

16 MR. ROACH: There's no time. There's no  
17 date.

18 MR. CUNNINGHAM: There's no date.

19 MR. ROACH: There's still time after that.

20 MR. LUBEL: Why not schedule these guys  
21 now for after that?

22 MR. ROACH: They will be available if you  
23 need them.

24 MR. CUNNINGHAM: They're not going  
25 anywhere.

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1 MR. ROACH: What we're looking at here is  
2 the entering wedge of what Mr. Lubel said in his  
3 letter was the "geometric growth of the number of  
4 witnesses."

5 He's got five people he -- he's got a lot  
6 more he wants from UP. This is his first test. He  
7 sent us letters asking for over 20 non-testifying  
8 witness depositions. And it just isn't necessary.

9 JUDGE NELSON: Well, it may be that we can  
10 get what we want by probing one deal and we don't have  
11 to go to all of them.

12 MR. ROACH: But I think if Mr. Gray can  
13 give all the details, which he can, then you don't  
14 need to probe four people to get into this deal.

15 JUDGE NELSON: This could be the  
16 equivalent of locker room talk between the boys that  
17 never is authorized or materializes in anything real  
18 --

19 MR. LUBEL: Your Honor, I --

20 JUDGE NELSON: -- for all you know.

21 MR. CUNNINGHAM: As far as I know, these  
22 guys made a deal that the company really wanted them  
23 to make because the company is trying to get all the  
24 contracts it can because it hasn't had -- cash flow  
25 from railroad operations until the memory of man -- to

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1 the contrary.

2 These guys are getting yelled at every day  
3 from Orris all the way down, go get the business. And  
4 they also got this instruction that said can you get  
5 all this support?

6 They made the deal and they wrote back and  
7 said hey --

8 MR. ROACH: You've got railroads with  
9 thousands of shippers. We didn't even limit our  
10 search to supporters. We searched for every single  
11 such transaction, and we found five.

12 This is a red herring if there ever was  
13 one.

14 JUDGE NELSON: So five shippers were  
15 induced -

16 MR. ROACH: No, we don't know that.

17 MR. CUNNINGHAM: No shippers were induced.

18 MR. ROACH: Your Honor, we have absolutely  
19 no --

20 MR. LUBEL: What I'm asking is that you  
21 order that I be able to depose these three guys and  
22 find out what other situations they might have done  
23 this in and what policy the company had, what their  
24 understanding of the company's policy was.

25 JUDGE NELSON: Which was is in Texas?

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1 MR. ROACH: This is also the only one that  
2 makes support -- that makes the contract contingent on  
3 the support from the merger.

4 MR. LUBEL: Sam Meade -- Sam Meade is the  
5 Director of National Accounts.

6 JUDGE NELSON: Which one is in Texas?

7 MR. LUBEL: I don't know.

8 MR. CUNNINGHAM: I believe Mr. Gehring,  
9 but I won't swear to that.

10 MR. LUBEL: Mr. Meade is the Director of  
11 National Accounts, which gives the impressions, Your  
12 Honor, that he has broader responsibilities across,  
13 you know, a national area.

14 JUDGE NELSON: What are the titles of  
15 these others?

16 MR. ROACH: It just means a large shipper.  
17 I think you know that.

18 MR. LUBEL: National Accounts?

19 MR. ROACH: Yes.

20 MR. LUBEL: Okay, good. All the more so,  
21 large shippers.

22 JUDGE NELSON: What about Mr. Jara? He's  
23 Director of Plastics Marketing.

24 MR. CUNNINGHAM: He's -- he reports to Mr.  
25 Gehring.

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1 JUDGE NELSON: Gehring is the highest up -  
2 -

3 MR. CUNNINGHAM: Yes.

4 JUDGE NELSON: -- of these three?

5 MR. CUNNINGHAM: That's my understanding.

6 MR. LUBEL: He's Managing Director of  
7 Chemicals Petro, SPO.

8 JUDGE NELSON: All right, anything else?

9 MR. ROACH: I just want to say to clarify  
10 the record, the other transaction -- this is the only  
11 one that conditions a contract on support for the  
12 merger, the only one.

13 The other transactions deal with rates  
14 that will exist after the merger. And so we produced  
15 those as well.

16 We searched high and low for anything that  
17 would satisfy this unsupported theory that the shipper  
18 support in this case is not genuine.

19 MR. LUBEL: Not totally unsupported, Your  
20 Honor.

21 JUDGE NELSON: Okay, maybe --

22 MR. LUBEL: Maybe there's more.

23 JUDGE NELSON: I'm going to direct the  
24 deposition of Gehring on the ground that he's the most  
25 senior of these characters.

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1 MR. CUNNINGHAM: With respect to this  
2 issue, Your Honor?

3 JUDGE NELSON: With respect to -- what is  
4 it you want to have him on the --

5 MR. LUBEL: Yes, this -- this --

6 JUDGE NELSON: -- the documents you're  
7 showing to me?

8 MR. LUBEL: These and any similar  
9 instances, and the two issues of predicated the --

10 JUDGE NELSON: You want to depose them on  
11 the subject of inducing customer support for the  
12 merger by making -- service commitments?

13 MR. LUBEL: Yes, or predicated some rate  
14 or support rate or service contract upon the customer  
15 support of the UP/SP --

16 JUDGE NELSON: Doing something for the  
17 customer in order to get their support for the merger.

18 MR. LUBEL: And/or -- and the second issue  
19 is the attempt to -- any attempt to lock up business  
20 that might -- that BN/SF might otherwise compete for.

21 MR. CUNNINGHAM: Your Honor, with all due  
22 respect to Mr. Lubel, I will represent as counsel that  
23 SP is making every effort it can to get all the  
24 business it can get at any minute that it can get it.

25 MR. LUBEL: Yes, but these are --

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1 MR. CUNNINGHAM: It's a proposition -- the  
2 proposition that it matters when they tried to do it,  
3 given that they are under a statutory obligation to  
4 compete like hell until this transaction is completed,  
5 it was --

6 MR. LUBEL: Your Honor, they're talking  
7 about this as they -- they talk about this very  
8 proceeding.

9 JUDGE NELSON: That's fine.

10 MR. LUBEL: I'm looking at where they try  
11 to --

12 JUDGE NELSON: You're talking about that  
13 sentence: "We should approve extensions as protection  
14 from BN/ATSF competition which force concessions  
15 result in that competitive access?"

16 MR. LUBEL: Yes, it says --

17 JUDGE NELSON: All right. I'll direct  
18 that he may be asked about that sentence.

19 MR. ROACH: Which, by the way, Mr. Lubel  
20 is misreading because this is not a two-to-one shipper  
21 and it's a very --

22 JUDGE NELSON: The witness can --

23 MR. ROACH: Absolutely.

24 JUDGE NELSON: Anything else? All right,  
25 we'll go forward as to Mr. Gehring then under such

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1 terms as counsel can agree upon. Where is he located  
2 physically?

3 MR. CUNNINGHAM: I stated Texas, Your  
4 Honor, but there may have been a move. So --

5 JUDGE NELSON: Oh, he's the one in Texas?

6 MR. CUNNINGHAM: Yes. We'll make him  
7 available at a place that it is --

8 JUDGE NELSON: Maybe you could do it  
9 Friday. Are you going to be at the --

10 MR. LUBEL: Your Honor, that's not  
11 convenient. I may have to be here for Mr. Anschutz's  
12 deposition.

13 JUDGE NELSON: Just trying to be helpful.

14 MR. LUBEL: Just to perfect the record,  
15 Your Honor, on the very last page, 3923, whoever wrote  
16 to Meade says, "The benefits of this will be long-term  
17 commitment and Quantum Park do not shop with BN/SF or  
18 other parties that may be in the Gulf area due to the  
19 SP/UP merger."

20 That's the last page. It's just a  
21 sentence just above what I had underlined.

22 MR. CUNNINGHAM: We don't contest that  
23 that statement is written in that document.

24 \*\*\* END OF CLOSED SESSION

25 JUDGE NELSON: All right. It's -- you

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1 wanted to quite at 2:00. It's 2:05.

2 MR. CUNNINGHAM: Yes, we've got a  
3 deposition.

4 JUDGE NELSON: Can you get to your  
5 deposition?

6 MR. LUBEL: Yes, and we'll bring these  
7 things --

8 MR. CUNNINGHAM: All the issues we had,  
9 we'll bring up at our meeting.

10 JUDGE NELSON: When do you want to have  
11 the next conference? Let's go off the record.

12 (Whereupon, the proceedings went off the  
13 record at 2:05 p.m. and resumed at 2:06 p.m.)

14 JUDGE NELSON: We'll conclude this  
15 discovery conference now, and resume next Thursday,  
16 which is the 15th of February. Is that correct? I  
17 believe so.

18 MR. LUBEL: It would have to be.

19 JUDGE NELSON: In a hearing room of the  
20 FREC. Do you want to start at 10:00 or earlier, 9:30  
21 maybe?

22 MR. LUBEL: Nine-thirty.

23 MR. ROACH: Nine-thirty is fine.

24 JUDGE NELSON: Nine-thirty. And I am  
25 going to ask counsel for the Applicants, as in the

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1 past, to fax all parties the restrictive service list  
2 to the effect that we are changing that conference to  
3 Thursday.

4 And therefore, if they want to get  
5 something on the agenda, they should be -- Tuesday by  
6 -- what's the cut-off, 4:00 p.m., isn't it? So will  
7 you take care of that?

8 MR. ROACH: Yes, Your Honor.

9 JUDGE NELSON: All right. We're agreeing  
10 then, and I'll see you next Thursday at 9:30 a.m.

11 MR. ROACH: Thank you.

12 MR. CUNNINGHAM: Thank you.

13 (Whereupon, the discovery conference  
14 concluded at 2:07 p.m.)  
15  
16  
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**CERTIFICATE**

This is to certify that the foregoing transcript in  
the matter of:

Discovery Conference:  
Union Pacific Corporation, et al.  
-Control and Merger-  
Southern Pacific Rail Corporation, et  
al.

Before: Surface Transportation Board  
Finance Docket No. 32760

Date: February 9, 1996

Place: Washington, DC

represents the full and complete proceedings of the  
aforementioned matter, as reported and reduced to  
typewriting.

Mahe Rudoff